TURNER BROTHERS, INC.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 86-243 Decided July 19, 1988
86-245

Appeal from decisions of Administrative Law Judge Miller affirming the issuance of Notice of Violation Nos. 84-03-006-018 and 84-03-006-025.

Affirmed in part and reversed in part.

1. Surface Mining Control and Reclamation Act of 1977: State Program: Generally

Publication in the Federal Register constitutes adequate notice of revocation of state primacy for the purposes of sec. 521(b) of SMCRA, 30 U.S.C. | 1271(b) (1982).

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Hearings: Generally

At a hearing OSMRE has the burden of going forward to establish a prima facie case as to the validity of the notice of violation by the submission of sufficient evidence to establish the essential facts of the violation. However, the ultimate burden of persuasion rests with the applicant for review. If OSMRE establishes a prima facie case and the evidence is not rebutted, the evidence will sustain the violation.

3. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Disturbed Areas--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

A prima facie case that surface drainage left the permit area, may be established by evidence of present or past drainage from a disturbed area flowing off the permit

> area. Alternatively, a prima facie case may be established by demonstrating that, under the conditions existing at the minesite at the time of inspection, there is a reasonable likelihood that surface drainage from a disturbed area would leave the permit area without passing through a sedimentation pond.

APPEARANCES: Mark Secrest, Esq., Muskogee, Oklahoma, for appellant; Jeanne S. Medawar, Esq., Office of the Regional Solicitor, Tulsa, Oklahoma, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Turner Brothers Inc. (Turner), has appealed two decisions of Administrative Law Judge Frederick A. Miller, dated December 20 and 31, 1985 (docket numbers TU-5-27-R and TU-5-43-R). The decisions affirmed the issuance of Notice of Violation (NOV) Nos. 84-03-006-18 (IBLA 86-243) and 84-03-006-025 (IBLA 86-245) which cited Turner for failure to pass all surface drainage through a sedimentation pond before leaving the permit area as required by Oklahoma Permanent Regulatory Program Regulation (OPRPR) section 816.42(a)(l). In each case Judge Miller also found the Office of Surface Mining Reclamation and Enforcement (OSMRE) to have properly exercised jurisdiction to inspect appellant's operations in Craig County, Oklahoma.

On appeal, Turner argues that it complied with the Oklahoma regulation and that OSMRE failed to present the evidence necessary to establish a prima facie case as to the violations. In particular, appellant asserts that OSMRE did not prove that surface drainage actually left the permit area without passing through sedimentation ponds because the OSMRE inspector had not actually seen either surface drainage or evidence of surface drainage leaving the permit area. Appellant also argues, as a preliminary matter, that OSMRE lacked authority to issue the NOV's, and therefore, the Office of Hearings and Appeals (OHA) was without jurisdiction to hear these cases. 1/ Appellant argues that the Federal assumption of enforcement authority was void because OSMRE allowed only 18 days between publication of notice of the Federal takeover of the Oklahoma surface mining regulatory program in the Federal Register on April 12, 1984 (49 FR 14674) and the April 30, 1984, effective date of the Federal takeover, whereas the Administrative Procedure Act (APA), 5 U.S.C. | 553(d) (1982), requires a period of 30 days after publication before a rule takes effect. Appellant asserts the takeover is a substantive rule which did not fit within any exceptions outlined in the APA.

[l] This Board has recognized the propriety of OSMRE's takeover of the Oklahoma enforcement program on a number of occasions. See, e.g.,

1/ OSMRE and OHA are separate and independent offices of the Department of the Interior. Administrative Law Judge Miller and the Interior Board of Land Appeals are part of OHA, and review actions of OSMRE pursuant to 43 CFR 4.1120 and 43 CFR 4.1101.

Turner Brothers, Inc. v. OSMRE, 93 IBLA 194 (1986), appeal dismissed, Civ. No. 86-C-852-C (N.D. Okla. Mar. 12, 1987); Turner Brothers Inc. v. OSMRE, 92 IBLA 381 (1986), aff'd, Civ. No. 86-C-741-E (N.D. Okla. Apr. 7, 1988). We have done so based on an order issued by the U.S. District Court for the Western District of Oklahoma finding that OSMRE properly exercised jurisdiction over the Oklahoma program. The court stated:

> [T]he Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C.A. | 1201, contains its own administrative procedure for notification, hearings and the like. These procedures include timelines, some of which conflict with the provisions and time- lines of the APA. The Court finds that the self-contained administrative procedures in SMCRA govern this case, overriding [the] APA. In so doing, the court rejects plaintiffs' contention that every agency action is either rule-making or an order subject to APA without regard to congressional provision of alternative kinds of administrative governance in more specific statutes. The defendants complied in full with the provisions of the SMCRA, specifically with 30 U.S.C.A. | 1271(b). [Footnote omitted.]

State of Oklahoma v. Hodel, Civ. No. 84-1202-A (W.D. Okla. Dec. 3, 1985).

The notice OSMRE published in the Federal Register on April 12, 1984, constituted adequate public notice for subsequent Federal enforcement pursuant to section 521(b) of SMCRA, 30 U.S.C. | 1271(b) (1982). Turner did not present a timely objection by filing a petition for judicial review of the alleged breach of procedural rulemaking requirements within the 60-day time limit found in SMCRA, 30 U.S.C. | 1276(a)(l) (1982), and has not shown that it filed a petition for judicial review in any Federal court within the time limit set by statute. By failing to file a timely objection, Turner has waived its right to object to the Secretary's decision. Judge Miller correctly dismissed the jurisdictional challenge.

We turn next to the facts of the cases on appeal. On September 17, Judge Miller conducted the hearing in case No. TU-5-43-R, addressing NOV No. 84-03-006-25 (IBLA 86-245). This NOV cited Turner for failure to pass surface drainage through a sedimentation pond because diversion ditch 5 had not been constructed at the time of the inspection. In support of its case, OSMRE introduced a copy of Turner's permit map to show where drainage would flow in the absence of a diversion structure (Exh. R-2). Inspector Funk testified that he had observed no diversion structure along a portion of one boundary of the permit area and no sedimentation pond at the base of an ephemeral drainage (Tr. 10-11). He identified and located on the exhibit a disturbed area of approximately 5 acres (Tr. 10-11). The inspector also testified as to a photograph he took during the course of his inspection (Exh. R-3). It shows large patches of snow on dark ground with patches of brush and trees in the background. The trees were identified as the southern edge of the disturbed area (Tr. 12). Inspector Funk testified that, when the snow melted, surface water on the disturbed area would flow toward an ephemeral drainage and eventually off the permit area without going through any drainage controls (Tr. 13). The inspector also testified that a "majority of the drainage would have entered an abandoned pit" which he

positioned on the map near a western boundary of the permit area (Exh. R-2, Tr. 14). He stated that the pit was not an approved sedimentation pond (Tr. 14). In response to a question about overflow from the pit, he indicated on the map that the flow would be within the permit area toward the same ephem-eral drainage (Tr. 15). On cross-examination the inspector testified that he did not actually see either surface drainage off the permit area or any evidence that surface drainage had flowed off the permit area (Tr. 17).

Gary Govier, appellant's chief mining engineer, testified for Turner. He stated that the area of operations was northeast of the place identified by Inspector Funk and near an old shale pit. He positioned these sites on a print from an aerial photograph with topographic overlay as being near the northern boundary of the permit area (Exh. A-1, Tr. 31). He also testified that there was a berm leading from the area of operations to sedimentation pond 4 as well as old spoil piles near the shale pit (Tr. 33-34). Based on a conversation with Jim Payne, superintendent at the minesite, Govier further testified that water leaving the shale pit would flow to the mining pit, be pumped up to the berm, and follow it to the sedimentation pond (Tr. 32-33, 35). Govier's testimony as to the flow of water was admitted as hearsay admissible in an administrative hearing (Tr. 32). He also testified as a professional engineer that, in his opinion, the berm was functioning as well as a diversion ditch would have if one had been constructed (Tr. 36).

In his decision, Judge Miller found that, based on the three elements necessary to sustain a violation for failure to pass drainage from a disturbed area through a sedimentation pond before leaving a permit area set forth in Consolidation Coal Co. v. OSMRE, 4 IBSMA 227, 237, 89 I.D. 632, 637 (1982), OSMRE had established a prima facie case. He rejected Turner's argument that OSMRE has not carried its burden, stating: "It is sufficient that the inspector testify, based on his experience and the topography of the area, that surface drainage from the disturbed area would flow off permit without first passing through a sedimentation pond" (Decision on Appeal at 4). The Judge also rejected Govier's testimony as to the flow of water at the minesite, stating that "[w]hile hearsay evidence is admissible this decision cannot be based on hearsay evidence alone" and that OSMRE had been denied an opportunity to cross-examine Payne. Consequently, Judge Miller held that the hearsay testimony "cannot be given sufficient weight to rebut OSMRE's prima facie case," and upheld the issuance of the NOV.

On September 18, 1985, Judge Miller held a hearing in case No. TU-5-27-R, addressing NOV No. 84-03-006-018 (IBLA 86-243). The NOV cited Turner for three areas of violation based on a breach in diversion structure l and the absence of diversion structures 2 and 4. For each area, OSMRE presented testimony based on photographs and reduced photocopies of portions of a permit map (Exhs. R-2, R-4).

Inspector Funk indicated on the map that the diversion structure identified on appellant's permit as diversion 1 edged the permit area and that the breach occurred in the middle of an area of diversion 1 at the 900-foot elevation (Tr. 10-11). However, he was uncertain where the permit line was in relation to the diversion ditch as construction on the ground and positioned the disturbed area some distance uphill from the permit boundary and diversion ditch (Tr. 10-12).

OSMRE also introduced a photograph showing a breach in a ditch with trees in the background (Exh. R-3). A small gray area of sediment just beyond a break in the ditch, appears to stop well before reaching the trees. The inspector testified that the permit boundary was "back in the trees somewhere" (Tr. 13). He also testified that if the diversion ditch had not been breached, it would have directed water to sedimentation ponds 2 and 4, but that with the breach water would flow "straight west off the permit area" (Tr. 15-16). On cross-examination, Inspector Funk stated that drainage which would flow into the breach would come from an area 50 feet wide or less and that the permit line was 200 to 300 feet beyond the disturbed area (Tr. 31-32).

Using the permit map, Inspector Funk also identified the position where diversion 2 should have been constructed but was not (Tr. 18). It was to have run from the top of a hill northerly to sedimentation pond 4. The inspector positioned the disturbed area to the west of the diversion line and described it as partially mined, backfilled, graded, and resoiled but not vegetated and stated that it was partially an open pit mine with spoils (Tr. 19). A photograph introduced to illustrate the second area of violation, shows a dark grey pile in the foreground with part of an exposed highwall behind it on the left and trees and brush to the right side and in the background (Exh. R-5). The inspector testified that the dark grey pile was spoil at the edge of a highwall and that the permit line was "at or near this [brush] area or to the right of the picture" (Tr. 20). He stated that drainage would flow northwest and that without diversion 2 to intercept it, drainage would continue off the permit area (Tr. 21-22).

Inspector Funk used the permit map to indicate where diversion 4 was to have been constructed along a southern boundary of the permit area (Tr. 22). He testified that an area had been disturbed north of and uphill from where the diversion structure was to have been built (Tr. 24-25). The inspector also testified that a photograph showed dark topsoil where the disturbed area was being resoiled and that the "permit lines [were] somewhere at or near the disturbance line back into the trees" (Exh. R-6, Tr. 27). The inspector testified that drainage would flow south off the permit because diversion 4 had not been built (Tr. 28-29). On cross-examination the inspector stated the disturbed area was within a few hundred feet of the permit boundary (Tr. 37).

Govier was also Turner's witness at the second hearing. Regarding diversion 2, Govier drew the position of an open pit mine on an aerial photograph permit map with topographic lines (Exh. A-3, Tr. 50). He testified that he believed diversion 2 had been constructed, indicating its position on the map (Tr. 51). Concerning the spoil pile shown in the photograph introduced by OSMRE, Govier testified that it was a graded, temporary berm used to direct surface drainage (Exh. R-5, Tr. 52-53). As to diversion 4, Govier testified that the photograph of the disturbed area showed some indication of a berm which may have been covered during the course of topsoiling operations under way at the time (Tr. 54). He further testified that at the time the NOV was issued, Turner had applied for permit revisions to change the boundaries of the permit area because a portion of the area permitted was not leased and the property owner had requested an

additional area be mined (Tr. 46-47, 50-51). Govier did not testify about the breach in diversion 1.

In his decision, Judge Miller found that OSMRE had established a prima facie case as to all three areas cited in the NOV. As in his decision on the hearing held the previous day, the Judge found that the lack of testimony as to surface drainage on or off the permitted site was not fatal to OSMRE's case. Rather, noting that the testimony had been "based on the topography that drainage from all three disturbed areas would lead off permit," the Judge concluded that OSMRE's proof "established that the features of all three areas were such that an precipitation [sic] event could cause water to flow downhill and off the permit area without first passing through a sedimentation pond" (Decision at 6).

[2] Our consideration of these appeals requires analysis of our recent decision in Alpine Construction Corp. v. OSMRE, 101 IBLA 128, 95 I.D. 16 (1988), appeal filed, No. 88-116-C (E.D. Okla.), which changed the prior interpretation the applicable law. At a hearing OSMRE has the burden of going forward to establish a prima facie case as to the validity of an NOV by the submission of sufficient evidence to establish the essential facts of the violation. 43 CFR 4.1171. However, the ultimate burden of persuasion rests with the applicant for review. 43 CFR 4.1171(b). If OSMRE establishes a prima facie case and the evidence is not rebutted, the evidence will sustain the violation. Tiger Corp., 4 IBSMA 202, 89 I.D. 622 (1982); James Moore, 1 IBSMA 216, 86 I.D. 369 (1979).

In Avanti Mining Co., 4 IBSMA 101, 89 I.D. 378 (1982), the Interior Board of Surface Mining and Reclamation Appeals (IBSMA), defined the factual elements of a prima facie case for failure to pass surface drainage through a sedimentation pond. As restated in Consolidation Coal Co., 4 IBSMA 227, 237, 89 I.D. 632, 637 (1982), these elements became the standard applied in a number of hearings and appeals: "(1) The existence of surface drainage which flowed from areas disturbed in the course of mining and reclamation operations; (2) that such drainage was not passed through a sedimentation pond; and (3) that the drainage left the permit area." 2/ As applied by IBSMA these elements could be established not only by evidence of drainage on the day of the inspection but also by credible evidence that past drainage from the disturbed area had flowed off the permit area. Id. at 242-43, 89 I.D. at 640. Thus, in Consolidation Coal a photograph of a breach in a berm showing erosion and containing standing water, and the inspector's testimony as to conditions at the site and the topographic features of the

2/ The elements defined in Avanti and Consolidation Coal were based on initial program regulation 30 CFR 717(a)(1) (1979). In Turner Brothers, Inc. v. OSMRE, 98 IBLA 395 (1987), the elements were applied
in a case arising under permanent program regulation 30 CFR 816.42(a)(1) (1983). The Oklahoma regulation at issue in the present case is substantially similar to the federal regulations. The Oklahoma regulation states: "All surface drainage from the disturbed area with the exception of reclaimed areas, shall be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area."

area, was sufficient to establish a prima facie case. Id. at 238, 89 I.D. at 638.

Our decision in Alpine focused on the third element requiring OSMRE to prove that surface drainage had in fact left the permit area. We overruled Avanti, Consolidation Coal, and Turner Brothers, Inc. v. OSMRE, 98 IBLA at 395, to the extent those cases were inconsistent with Alpine. Alpine Construction Corp. v. OSMRE, 101 IBLA at 137-38, 95 I.D. at 21-22. In particular, we stated:

> We do not think a showing that surface drainage actually left the permit area is necessary to establish a violation of 30 CFR 715.17(a). The proper emphasis must be placed upon whether, given the topography, a sedimentation pond is necessary to prevent surface drainage from leaving the permit area. When the evidence establishes that there are no sedimentation ponds, and that surface drainage has left or will leave the permit area, a violation of 30 CFR 715.17(a) is established. [Emphasis in original.]

Id. at 139, 95 I.D. at 23. In Turner Brothers, Inc. v. OSMRE, 102 IBLA 299, 306 (1988), the Board modified Alpine to hold that the evidence must show "a reasonable likelihood that there will be surface drainage from areas disturbed in the course of surface coal mining and reclamation operations, that it will not pass through a sedimentation pond or siltation structure, and that it will leave the permit area * * *."

Our concern in this case is the evidence required in support of a factual determination that surface drainage is reasonably likely to leave the permit area. With this concern in mind, we review the cases on appeal. As to the first hearing concerning the disturbed area covered by snow (IBLA 86-245), Turner argues that OSMRE failed to establish all three elements of a prima facie case defined by Avanti and Consolidation Coal because the inspector admitted on cross-examination that he did not observe surface drainage on or off the permit area and did not observe any evidence that surface drainage had left the permit area (Appellant's Brief at 5, Tr. 17). Turner also argues, based on Govier's testimony, that the evidence was sufficient to show surface drainage would not leave the permit area. In reply, OSMRE argues that the inspector's testimony was sufficient because an inspector does not have to observe surface drainage leave a permit area but may
testify that, based on the topography of the area, water would flow off the permit area unimpeded by sedimentation controls.

Based on our review of the record, we find OSMRE to have established, the first element of a prima facie case. In Alpine the Board noted, as had IBSMA in Avanti and Consolidation Coal, the preventive purpose of the regulation at issue. Alpine Construction Corp. v. OSMRE, 101 IBLA at 139, 95 I.D. at 23. Given this purpose, we find the photograph of a large snow covered, disturbed area, as verified by the inspector's testimony, to be sufficient evidence to establish the first element of OSMRE's prima facie case. To hold otherwise would be, in effect, to require the inspector to return on a warmer day to observe that the snow had melted and water had run off the disturbed area.

As to the second element of a prima facie case, the inspector testified that sedimentation pond 7, located at the base of the ephemeral drainage where surface drainage from the disturbed area would leave the permit area, had not been constructed at the time of his inspection (Tr. 11). We find this testimony to be sufficient to establish the second element of OSMRE's prima facie case. Accordingly, we consider whether Turner met its burden of persuasion to rebut OSMRE's evidence as to the element. Turner did not contend that sedimentation pond 7 had been constructed. Rather, its defense was, first, that the disturbed area and the old shale pit actually were northeast of the position identified by the inspector and, second, that spoil piles and berms in the area would direct surface drainage to sedimentation pond 4. If true, such circumstances would be sufficient to rebut OSMRE's prima facie case.

While the company's position is plausible, for several reasons we decline to find OSMRE's prima facie case to have been rebutted. In examining appellant's Exhibit 1, we note that the witnesses placed the disturbed area at locations which are 1,000 to 1,200 feet apart. The inspector identified the area on the side of a slope, while Govier identified a flat area to the east of and at the top of the slope. Similarly, the witnesses positioned the shale pit at locations approximately 1,400 feet apart with a 60-foot difference in elevation. The only clear point of agreement between the parties is the presence of water in the shale pit. The inspector testified that water was present the day of his inspection (Tr. 18, 28), and Govier stated that there had been water in the pit from the time he first saw it (Tr. 33). Although appellant's Exhibit 1 is dated some 2 years prior to the date of the inspection, it distinctly shows a body of water at the approximate position identified by the inspector, and there is none in the area identified by Govier. As noted by the Judge, even if Turner is correct, the inspector testified some surface runoff would flow into the ephemeral drainage. Turner had the burden of producing evidence to rebut OSMRE's prima facie case, and we are surprised that, given the nature of the conflict, the company failed to present more definite evidence as to its area of operations at the time of the inspection, the location of the shale pit, and the presence of the spoil piles and berms which, according to Turner, controlled surface drainage in the area. Maps, photographs, company records, or other evidence relatively contemporaneous with the inspection could have been used to show error in the inspector's testimony and, thus, firmly establish the truth of Turner's assertions. Absent more definite evidence, we cannot conclude that the evidence presented was sufficient to overcome OSMRE's prima facie case. 3/

3/ Although we reach the same result as Judge Miller, we do so on a different basis. As previously quoted, the Judge found that the hearsay evidence presented by Turner could not, by itself, be given sufficient weight to rebut OSMRE's prima facie case. The Judge was correct that in an administrative hearing questions as to the reliability of hearsay go to the weight of the evidence rather than its admissibility. We note there is some debate whether the "legal residuum rule" relied on by the Judge remains viable in Federal administrative law. Compare 3 Davis Administrative Law Treatise | 16:6 (2d ed. 1980) with 4 Stein, Mitchell & Mezines, Administrative Law | 26.02 (1987).

[3] As to the third element, that surface drainage left the permit area, or that there is a reasonable likelihood that it will leave the per-mit area, it is clear that an inspector may testify that the topography of an area shows surface drainage will flow off a permit area without passing through a sedimentation pond. As discussed above, Avanti and Consolidation Coal, required OSMRE to present evidence of either present or past drainage from a disturbed area flowing off the permit area. This point was the basis of our decision in Turner Brothers, Inc. v. OSMRE, 98 IBLA at 395. However, it was also on precisely this point that Alpine overruled Turner. A prima facie case may also be established by an inspector testifying that surface features establish that, under the conditions at the minesite, there is a reasonable likelihood that surface drainage from a disturbed area will leave the permit area without passing through a sedimentation pond. Turner Bro-thers, Inc., 102 IBLA 299 (1988). In the present case, the position of the disturbed area on a hillside above an ephemeral drainage, the position of the shale pit near the boundary of the permit area, and the presence of snow on the ground, were sufficient to establish a prima facie case as to the third element.

We next consider the three areas of violation addressed by the second decision on appeal (IBLA 86-243). In regard to the first area of viola-
tion, the breach in diversion 1, we have no trouble agreeing that OSMRE established the first two elements of a prima facie case. The photograph introduced at the hearing (Exh. R-3), combined with and verified by the inspector's testimony, firmly established that surface drainage had left the disturbed area and had not been directed toward a sedimentation pond. At the hearing Turner did not present any evidence to rebut OSMRE's case as to these two elements.

It is less clear whether OSMRE established the third element of its prima facie case. Turner correctly points out that the inspector did not testify that surface drainage had left the permit area and, therefore, the evidence did not satisfy the standards of Avanti and Consolidation Coal. In considering how to apply Alpine, and our subsequent Turner Brothers decision, several difficulties in the evidence present themselves.

As illustrated by the inspector at the hearing, OSMRE's Exhibit R-2 shows a disturbed area near the top of a hill, arrows indicating the flow of water downhill toward diversion 1, and a mark showing where the diversion was breached. Considered by itself the exhibit suggests that at least some surface drainage from the disturbed area would flow toward the breach in the diversion and off the permit area. However, the inspector's testimony establishes that the exhibit does not represent what he had found at the minesite. In drawing the position of diversion 1, the inspector noted that he did so "assuming it's located near the permit line," but actually "it was located near the disturbance line" (Tr. 10-11). In identifying photograph R-3 the inspector stated that the foreground showed a disturbed area that had been backfilled, graded, and perhaps resoiled, the diversion ditch, and a tree line which was the edge of the disturbed area (Tr. 13). Thus, notwithstanding the representation on exhibit R-2 that the diversion was adjacent to the permit boundary, it is clear from the photograph (Exh. R-3) and

the inspector's testimony that the diversion ditch was constructed adjacent to the disturbed area.

The disturbed area identified by the inspector on Exhibit R-2 appears to be at the 920-foot elevation, with the area identified as the top of the hill at the 930-foot elevation (only the 900-foot elevation is labeled). However, the greater detail shown by the aerial photograph permit map (Exh. A-3) shows the top of the hill to be at the 950-foot elevation. The 920-foot elevation runs at an angle to the western permit boundary and varies from 500 to 1,000 feet distance from it. The western boundary runs across a relatively flat area at the 900-foot elevation. The area extends 300 feet north-south, 200 to 300 feet to the west of the boundary, and 300 to 400 feet to the east before reaching the 910-foot elevation. While it is difficult to ascertain precisely where the disturbed area should be placed on the aerial photograph due to differences in both the shape and number of contour lines, we will accept Inspector Funk's placement of the western edge of the disturbed area as near the 920-foot elevation. The scale of Exhibit A-3 shows the 920-foot contour to be approximately 500 feet from the permit boundary in the area of concern. Consequently the edge of the disturbed area is 500 feet from the western permit boundary and approximately 400 feet from the southern permit boundary in the area, which is generally consistent with the inspector's acknowledgement on cross-examination that a 300-foot distance was not "out of reason" (Tr. 32).

Even assuming the disturbed area to be near the 920-foot elevation, however, we are unable to conclude that the record presents sufficient evidence that there is a reasonable likelihood that surface drainage will flow off the permit area. While it is obviously true that water flows downhill, it is also the case that water is absorbed by the ground it passes over and diverted by whatever surface features are present. In the present case, there was a substantial wooded area between diversion l and the western and southern permit boundaries (Exhs. A-3, R-3, Tr. 13, 32-33). In contrast to the violation in the first case which we have upheld, to find the evidence sufficient to establish a prima facie case as to the third element of this violation would require a conclusion that, under the conditions at the site, there is a reasonable likelihood that drainage from an area 50 feet wide or less (according to the inspector's testimony) would flow at least 400 feet across an area covered by trees, brush, and grass. In theory, given a sufficient volume of water, such an event might occur. However, there is no evidence of the volume required or that the area could receive (even in a hundred year storm) the required amount of snow or rainfall. 4/ While not

4/ To assume that sufficient precipitation could occur renders all other conditions at the permit site irrelevant. No matter how small the disturbed area, no matter how far it is from the permit boundary, no matter what the intervening terrain, the probability that surface drainage would not leave the permit area could be overcome by simply assuming that the necessary amount of precipitation could occur. As a consequence, the showing of fact required as the third element of a prima facie case would be based on nothing more than an assumption. Such an assumption is also inconsistent with the regulatory approach OSMRE has adopted. An operator is not required to

determinative, we note that Exhibit R-3 and the inspector's testimony indicate that the surface drainage which did occur was insufficient to carry sedimentation into the trees. Accordingly, we cannot conclude that OSMRE established the third element of its prima facie case.

The other two areas of violation cited by OSMRE can be considered together because the evidence presented at the hearing presents related difficulties in concluding that OSMRE established a prima facie case. The inspector testified that he did not see any surface drainage on the permit area the day of his inspection (Tr. 38, 40-41, 43), and he did not give any testimony as to evidence of surface drainage having flowed off the permit area or the disturbed areas in the past. In both instances the question is whether his testimony established a foundation for a conclusion that there is a reasonable likelihood that surface drainage from the disturbed area will leave the permit area. Turner Brothers, Inc. v. OSMRE, 102 IBLA 299 (1988).

It appears that the inspector's concern in citing the area of the spoil pile (Exh. R-5) was the absence of diversion 2 to control drainage from a disturbed area to the east. Inspector Funk testified that drainage to the northwest would pass off the permit area in the absence of the diversion (Tr. 22). However, the spoil pile shown in Exhibit R-5 became the focus of the testimony presented at the hearing, and no additional evidence was presented regarding the condition of the remainder of the area of operations. Turner's engineer, Govier, testified that the photograph showed a spoil pile graded as a temporary berm (Tr. 52). When asked on cross-examination whether the photograph showed a berm, the inspector testified he did not consider the spoil pile to constitute a constructed berm (Tr. 36-37).

fn. 4 (continued)
protect against all conceivable events which might cause surface drainage to leave a permit area, but is required to protect against a reasonably foreseeable range of events which are defined in the regulations as construction standards. Sedimentation ponds are required to contain or treat a 10-year, 24-hour precipitation event. 30 CFR 816.46(c)(1)(C). Temporary diversions of perennial and intermittent streams must be able to contain a 10-year, 6-hour precipitation event, and permanent diversions of such streams must contain a 100-year, 6-hour event. Id. at 816.42(c)(3). Other temporary diversions must contain a 2-year, 6-hour precipitation event and other permanent diversions must contain a 10-year, 6-hour event. Id. at 816.42(c)(3). Similar provisions are found in the Oklahoma regulations. See OPRPR 816.42 through 816.46. It would be incongruous to establish a standard requiring protection against a specific range of events, but then, when a diversion structure or sedimentation pond meeting the standard is breached or overflows, hold the operator responsible because it is assumed that there could be sufficient precipitation to allow surface water to reach the permit boundary. Such an assumption is tantamount to establishing a standard under which every operator is in continual violation of the regulation because, whatever the design and construction of a diversion structure or sedimentation pond, assuming sufficient rainfall, there could be a breach or overflow and water would flow off the permit area.

Viewed as either a spoil pile or a graded temporary berm constructed of spoil, the question is whether drainage would flow off the permit area. If the answer could be determined on the basis of the slope of the pile, we would conclude that water would runoff. However, as with the first area of violation, the likelihood of drainage leaving the permit area depends upon a number of conditions which do not appear in the record. The size of the pile is not stated in the record and it is impossible to determine either its length or height because of the angle of the photograph and lack of measurable features. The distance from the pile to the permit boundary is not indicated other than by the inspector's testimony that it was at or near the permit boundary. As with the first area of violation, these factors, along with grade and type of surface and the amount of precipitation, have bearing on the determination of the likelihood that surface drainage would leave the permit area. Absent more definite information, we cannot conclude that OSMRE established a prima facie case that, under the conditions found at the minesite, there is a reasonable likelihood that surface drainage will leave the permit area.

The position of the third disturbed area shown by the photograph marked as Exhibit R-6 was identified on the aerial photograph map by Govier (Tr. 53-54) and agreed to by the inspector (Tr. 58-59). The area was stated by the inspector to be several hundred feet from the permit boundary (Tr. 37), and the map shows the distance to be approximately 300 feet (Exh. A-3). The position identified is toward the top of a ridge which is tree covered, as is also shown in the photograph (Exh. R-6). The disturbed area is fairly large, and obviously more surface drainage could flow from it than would flow from the spoil pile. There is no evidence, however, as to the amount of precipitation needed to cause water from the disturbed area to leave the permit area. Additionally, there was evidence of a berm at the edge of the disturbed area. Inspector Funk described the disturbed area shown in the photograph (Exh. R-6) as an area that was being "resoiled" with topsoil (Tr. 27). Earthmoving equipment is visible in the photograph (Exh. R-6). The inspector stated that he would not consider a berm of 6 inches to 2 feet at the edge of the area to be a diversion structure (Tr. 40). Turner's engineer Govier testified to appellant's practice at this stage of reclamation of putting up a topsoil berm so that it can be revegetated (Tr. 65).

As with the pile shown in Exhibit R-5, whether the material shown on the edge of the disturbed area in Exhibit R-6 is or is not regarded as a proper berm is not determinative. Where the material is present, water would be directed away from the edge of the disturbed area and thus be prevented from flowing off the permit area. The real question is where it would go after being diverted. The amount of water which may accumulate, the direction of its flow, as affected by the immediate features and the general slope of the land, and the size of the permit area all have direct bearing on the reasonable likelihood that water will leave the permit area. Standing alone, a contour map depicting the lay of the land prior to the commencement of the mining activities cannot establish these facts, because mining operations change the contour of the land. Without additional evidence that the drainage patterns remain unchanged, or evidence of how they have been changed, a map depicting premining contours is of little value. Additional evidence regarding the features of the mined area at the time of

the inspection is necessary. Thus, the evidence presented in this case is not sufficient to support a finding that there is a reasonable likelihood that surface drainage from the disturbed area will leave the permit area.

So that the parties may properly understand our rulings in these cases, several matters need to be noted. In both hearings OSMRE was straightforward in presenting its theory that topographic evidence was sufficient to establish a prima facie case as to the violations at issue. This permitted Turner an opportunity to confront and respond to the evidence and in turn has allowed us to consider the evidence in detail.

In Alpine and Turner Brothers, 102 IBLA 299 (1988), the Board adopted the general position advocated by OSMRE and overruled in part the prior decisions, we did not hold, as appears to have been advocated by OSMRE in the present cases, that a prima facie case can be established by merely tendering as evidence topographic map submitted as a part of the mine plan. To do so would reduce the proof required to establish a violation of the regulation to an inspector's testimony that a siltation structure had not been constructed and the area identified on the permit map as the disturbed area was at a higher elevation than some portion of the permit boundary.

Rather, the question whether "surface drainage has left or will leave the permit area is a question of fact. More precisely, it is a question whether the facts about conditions of the permit site show a reasonable likelihood that surface drainage from the disturbed area will leave the permit area. The possibilities are not infinite but depend upon the conditions at each area of violation cited by OSMRE. Obviously, it is easier to draw an inference that there is a reasonable likelihood that surface drainage will leave the permit area when the disturbed area is 5 or 10 feet from the permit boundary than when the distance is 200 or 300 feet, or when the disturbed area is on a steep slope rather than relatively flat land, or when the ground between the disturbed area and the permit boundary is bare rock rather than densely covered with vegetation. Similarly, the likelihood of surface drainage from the disturbed area leaving the permit area depends on the nature and extent of the disturbance at the time of the inspection.

Our rulings in these cases do not preclude OSMRE from issuing a notice of violation when it is concerned with conditions which might cause environmental harm. From the outset, Departmental decisions regarding the requirement that surface drainage be passed through a sedimentation pond have recognized its preventative purpose. This does not mean, however, that the regulation applies in all situations. To the extent OSMRE is concerned about an operator's failure to construct a sedimentation pond or diversion ditch prior to undertaking surface mining activities, depending upon the circumstances, OSMRE is empowered to issue a notice of violation for failure to conduct mining operations in compliance with an approved permit application or to meet a condition of the permit (see 30 CFR 773.17, 843.12), failure to conduct surface mining operations in accord with the hydrologic plan submitted with the application (see 30 CFR 780.21(h), 816.14(d)), failure to utilize the best available technology to prevent suspended solids from entering the streamflow outside the permit area (see 30 CFR 816.43), and failure to place spoil or waste in the proper area (see 30 CFR 816.71,

816.81). OSMRE may also cite an operator for failure to construct a siltation structure prior to beginning surface mining activities (see 30 CFR 816.46(b)(3)). In the present case, such alternatives were available under OPRPR 816.46(a)(5) and 816.46(a)(1), requiring the construction of sedimentation ponds prior to beginning surface mining activities in a drainage area, OPRPR 816.43 and 816.45, establishing standards for diversions and sedimentation control measures; and other provisions of the Oklahoma regulations governing hydrologic protection.

An operator's failure to observe the surface mining standards can have severe environmental consequences, including the contamination of streams and other waters by acids and other contaminates from disturbed areas. For this reason failure to construct and maintain a proper system for containing surface drainage can be a significant violation. This does not mean, however, that every instance of such failure will result in a reasonable like-lihood that surface drainage from the disturbed area will leave the permit area in violation of the requirement that it be passed through a sedimentation pond.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.l, the decision of Administrative Law Judge Miller in IBLA 86-245 is affirmed and the decision in IBLA 86-243 is reversed.

R. W. Mullen
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge